Indian Tribe intervened in *United States v. Washington* in August 1974, the United States relied upon the list from which Samish had been dropped and took the position that the Samish Tribe was not federally recognized or entitled to that status. The Samish Tribe failed to prove at that time that it was entitled to exercise treaty rights under the legal standard applicable to unrecognized Indian tribes. *Washington II* and *III*, *cert. denied*, 454 U.S. 1143 (1982).

In both *Washington II* and *Washington III*, the United States, the United States District Court, and those tribes opposing Samish treaty status all suggested that future federal recognition of the Samish Tribe would probably warrant reexamination of the Samish Tribe's treaty fishing rights. *Samish Indian Tribe*, *supra*, 394 F.3d at 1155.[8] These promises were in substantial part the basis for the Ninth Circuit's decision that the Samish Tribe had shown extraordinary circumstances for purposes of Rule 60(b)(6) sufficient to vacate the judgment against the Samish Tribe in *Washington II*. *See Samish Indian Tribe*, *supra*, 394 F.3d at 1159.

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[8] The most explicit of these promises was made to this Court by the United States in its Brief for United States in Opposition to Petition for Writ of Certiorari, where the United States said: "should [the Samish] succeed in obtaining 'acknowledgment' of their current status as [an] 'Indian tribe[ ]' in the pending administrative proceedings, this might justify an application to re-open the present judgment against them." No. 81-509, p. 12, n.7. *Samish Indian Tribe*, *supra*, 394 F.3d at 1155 n.4. The United States represented that federal recognition of a tribe as the successor in interest to a treaty party "may well be controlling," under the political question doctrine and the deference that the federal courts must give the Executive Branch with regard to its dealings with Indian tribes. *Id.*; 394 F.3d at 1158 n.8.

The Samish Indian Tribe pursued federal recognition in light of the representations that had been made to the Tribe by the United States, the District Court, and some treaty tribes. *Samish Indian Tribe, supra*, 394 F.3d at 1155. The United States and the Indian tribes filing the present certiorari petition vigorously opposed Samish's recognition application. *Id.*, at 1156; *Greene I, supra*. After seventeen years of litigation, the Samish Tribe finally achieved full federal recognition in November 1996 – with reinstatement of factual findings wrongfully removed by the Assistant Secretary for Indian Affairs after ex parte meetings with federal advocates. The Tulalip and other tribes sought to intervene in the Samish recognition proceeding on the ground that Samish recognition might affect their treaty rights. *Greene I, supra*, 996 F.2d at 975-76. The District Court and Ninth Circuit ruled that Tulalip and the other tribes "ha[d] no protectable interest" that would entitle them to intervene on the issue of Samish recognition. *Id.* at 978.[9]

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[9] Contrary to the assertion made in the certiorari petition, Petition, p. 10, the Ninth Circuit has never ruled that the Tulalip and other opposition tribes would have the right to intervene in the Samish recognition proceeding if they could show their treaty rights would be impacted; the Ninth Circuit in *Greene I* expressly rejected this argument. 996 F.2d at 976-978. As the Ninth Circuit observed several times, Tulalip and other opposition tribes **would** have an opportunity to weigh in on Samish treaty status outside the Samish recognition proceeding because Samish could challenge the prior treaty judgment against it only in the ongoing *United States v. Washington* proceeding, and the other tribes were already parties to that proceeding. *Id.* Samish undertook such a direct challenge in *United States v. Washington* by filing its Rule 60(b)(6) motion. Opposition tribes will also have an opportunity to argue their interests once Samish files to intervene in *United States v. Washington* to exercise its treaty rights.

After achieving formal federal recognition and reorganizing its tribal government, the Samish Tribe asked the United States to bring an action on the Tribe's behalf to reopen the judgment against the Samish Tribe in *United States v. Washington*. The Department of Interior and Department of Justice took three years to deny the Samish Tribe's request, upon which the Samish Tribe became eligible for discretionary attorney fee funding under 25 C.F.R. § 89.41. Soon after obtaining this funding, the Samish Tribe petitioned the District Court in *United States v. Washington* to vacate the judgment against the Tribe pursuant to F.R.C.P. 60(b)(6).

The District Court denied the Samish Tribe's motion on the basis that federal recognition was irrelevant to the issue of treaty status and because of finality concerns. The Ninth Circuit reversed, concluding that findings of fact underlying the Samish Tribe's federal recognition, the United States' express promise to revisit Samish treaty status upon successful federal recognition, and other extraordinary circumstances had prevented the Tribe from proving its tribal status in proper fashion. 394 F.3d at 1159. The Ninth Circuit held that these extraordinary circumstances justified reopening the judgment against the Samish Tribe in *Washington II*.

Contrary to assertions made in the petition for certiorari, the Ninth Circuit's decision in *Samish Indian Tribe* is fully consistent with prior decisions of this Court, decisions of the Ninth Circuit, and decisions of other Circuits. This case involves subsection (6) of Rule 60(b) and does not implicate other subsections of that Rule. The decision will not upset settled decisions in *United States v. Washington*. When the Samish Tribe obtains treaty status after a hearing on remand of this case, the District Court will

then have authority to re-allocate the tribal harvest share and other details of actual exercise of Samish treaty rights, applying equitable considerations. *United States v. Washington*, 157 F.3d 630, 652-55 (9th Cir. 1998) (allocation of treaty harvest subject to equitable considerations and balancing of interests of parties); *Greene I, supra*, 996 F.2d at 977("['*Washington I* district court'] is the forum that will resolve ultimately any attempt to reallocate treaty fishing rights and that is the forum where Tulalip *and all other interested parties* can have their say." (emphasis in original)). Speculative consideration of possible dilution of tribal harvest share is premature before this Court.

In its two earlier Samish decisions, the Ninth Circuit made it clear beyond dispute that a Rule 60(b)(6) challenge to the 1979 judgment against Samish treaty status was "inevitable" if the Samish Tribe prevailed in the then unlikely possibility[10] of achieving federal recognition. *E.g.*, *Greene I, supra*, 996 F.2d at 977 ("The [Tulalip] Tribe is no doubt correct that should the Samish prevail before the BIA and gain recognition, the next step would be to assert fishing rights as well."); 978 ("a direct challenge to the allocation of treaty fishing rights . . . may be inevitable"). Petitioners have not presented an accurate picture of how Samish treaty rights were raised in the Samish recognition proceedings.

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[10] The Bureau of Indian Affairs had denied the Samish Tribe's petition for federal acknowledgment under the Federal Acknowledgment Regulations in 1982 and 1987, in proceedings later found by the District Court and Ninth Circuit to have violated the due process rights of the Samish Tribe. *See Samish Indian Tribe, supra*, 394 F.3d at 1155-56; *Greene II, supra*, 64 F.3d at 1269 (history of Samish recognition petitions), 1271-1274 (Samish had property interest entitled to due process before cutoff of benefits); 25 C.F.R. Part 83.

Both the district court and Ninth Circuit correctly ruled that **for purposes of the Samish recognition proceeding**, the judgment against Samish in *Washington II* was res judicata. *See* Petition for Certiorari, pp. 5-6. The courts did not say that Samish treaty status could never be reconsidered under any circumstances or in any forum; the courts said only that Samish treaty status could not be relitigated in the Samish recognition proceedings and that Samish could not use its treaty status as a ground to achieve federal recognition. *Greene I*, *supra*, 996 F.2d at 977 ("the Samish need not assert treaty fishing rights to gain federal recognition"); *Greene v. Lujan*, No. C89-645Z (W.D.Wash.), Order dated Feb. 25, 1992, 1992 WL 533059 (unreported). What the Ninth Circuit and District Court did say on the issue of relitigating Samish treaty status was that any Samish challenge to the judgment against Samish in *Washington II* and *III* must take place in the ongoing *United States v. Washington* proceeding. *E.g.*, *Greene I*, *supra*, 996 F.2d at 977-78.

In *Samish Indian Tribe*, the Ninth Circuit examined the findings of fact underlying Samish administrative recognition by the United States – made pursuant to the federal acknowledgment criteria in 25 C.F.R. Part 83 – and concluded that in achieving recognition Samish also met the standard necessary to exercise treaty rights. 394 F.3d at 1158. The Court of Appeals then examined its precedent and found that it had never concluded that federal recognition is irrelevant to a tribe's exercise of treaty rights. *Id.* The Ninth Circuit found that it "ha[d] never held that federal recognition is not a *sufficient* condition for the exercise of ['treaty fishing'] rights." *Id.* (Emphasis in original). The Ninth Circuit then concluded: "Although we have never explicitly held that federal recognition

necessarily entitles a signatory tribe to exercise treaty rights, this is an inevitable conclusion." *Id.* at 1159. Integrating its prior precedents with the findings of fact made in the Samish recognition proceeding that the Samish Tribe was a party to the Treaty of Point Elliott, has been continuously identified throughout history as Indian and has existed as a distinct community maintaining political influence within itself as an autonomous entity since first sustained European contact, the Ninth Circuit ruled: "As the Samish are a signatory tribe and have proved the single necessary and sufficient condition for the exercise of treaty rights, the res judicata effect of *Washington II* is all that is keeping the Samish from pursuing its treaty rights." 394 F.3d at 1160.

As this language reflects, the *Samish Indian Tribe* decision does not dispense with the res judicata effect of the Samish judgment in *Washington II*. The Ninth Circuit in *Samish Indian Tribe* decided, based on facts in the Samish recognition proceeding and extraordinary circumstances, that standards established under Rule 60(b)(6) require that the judgment in *Washington II* be set aside and that the Samish Tribe be allowed to revisit the issue of its treaty status in *United States v. Washington*. The Court held that the Samish Tribe was effectively prevented from proving its tribal status in *Washington II* in proper fashion because of the

> government's "excessive delays and . . . misconduct" in withholding recognition from the Samish, a circumstance beyond their control; the government's position in *Washington II* that federal recognition was necessary and that future federal recognition might justify revisiting the treaty rights issue; and the district court's erroneous conclusion that nonrecognition was

> decisive and wholesale adoption of the United States' boiler-plate findings of fact in *Washington II*. . . .

394 F.3d at 1159. The Samish Tribe met the standards established by Rule 60(b)(6) under these facts because "federal recognition is determinative of the issue of tribal organization, the issue upon which the Samish were denied treaty rights in *Washington II*": "As the Samish's lack of recognition was a circumstance beyond the tribe's control, their subsequent recognition is an extraordinary circumstance that warrants setting aside the judgment in *Washington II*." 394 F.3d at 1159, 1161.[11]

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[11] This finding that the Samish Tribe was effectively prevented by the federal government from challenging denial of federal recognition was recently confirmed by the Federal Circuit Court of Appeals in a separate proceeding. *Samish Indian Nation*, *supra*, 419 F.3d at 1373 ("Because tribal recognition remains a political question, the trial court erred in holding that Samish 'could have pursued the present action in court before the administrative proceedings [concerning the Samish petition for federal acknowledgment] were concluded. . . . [T]he Samish cause of action for retroactive benefits did not accrue until they obtained a final determination from the district court, through their APA challenge, that the government's conduct underlying its refusal to accord federal recognition, before 1996, was arbitrary and capricious." The Federal Circuit concluded that the Samish Tribe should always have been federally recognized, *Id.* at 1373, citing the District Court's decision: "[T]he district court finally established that the government wrongfully withheld the Samish federal acknowledgment and disregarded facts that would have supported historic recognition. . . . [T]hose findings support the Samish contention that but for the government's arbitrary and capricious treatment the Samish would have been extended federal recognition prior to 1996." *Id.* at 1374 (citing *Greene v. Babbitt*, 943 F.Supp. 1278 (W.D.Wash. 1996) ("*Greene III*")). As the Ninth Circuit noted in *Samish Indian Tribe*, "The Samish would almost certainly have won the right to exercise its treaty fishing rights had the tribe been federally recognized at the time of *Washington II*. 394 F.3d at 1159.

REASONS WHY PETITIONERS' PETITION FOR A WRIT OF CERTIORARI SHOULD NOT BE GRANTED

A. The Ninth Circuit's Ruling Did Not Deny Petitioners Due Process Of Law.

Petitioners argue that the District Court's rejection in 1989 and 1992 and the Ninth Circuit's rejection in 1995 of the Tulalip Tribes' attempt to intervene and participate in the Samish administrative recognition proceeding pursuant to 25 C.F.R. Part 83 denied it and other similarly situated tribes due process. Petition for Certiorari, pp. 9-12. Petitioners' argument is based upon the erroneous belief that the District Court and Ninth Circuit told the Tulalip Tribes that the Samish Tribe would never be able to revisit its treaty rights even if it successfully achieved federal recognition. As discussed above in the Statement of the Case, this belief is patently wrong. No such promise was ever made; in fact, the Ninth Circuit several times stated the opposite – a challenge by the Samish to the judgment in *Washington II* was inevitable if the Samish Tribe successfully achieved federal recognition.

To have a due process right, a party must have a "significantly protectable interest." *Greene I*, *supra*, 996 F.2d at 976 (citing *Portland Audubon Society v. Hodel*, 866 F.2d 302, 309 (9th Cir.), *cert. denied*, 492 U.S. 911 (1989)).[12]

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[12] Petitioners assert on page 11 of their petition that any party "affected" by government action must be given due process, citing *California v. FERC*, 329 F.3d 700, 708 n.6 (9th Cir. 2003). That is not what that decision actually says. Earlier in the decision the court stated that a party must have a "legally protected interest" to qualify for constitutional due process, 329 F.3d at 707, and the Court assumed for purposes of the case, without deciding the issue, that the party in question had been deprived of a liberty or property interest. *Id.*, n.3.

Both the District Court and the Ninth Circuit during the appeal of the 1987 BIA administrative decision denying the Samish Tribe federal recognition held that the Tulalip Tribes had no protectable interest on the issue of Samish recognition. *Greene I*, *supra*, 996 F.2d at 978; *see Greene v. Lujan*, No. C89-645Z, Transcript of Hearing on Tulalip Motion to Intervene, Oct. 12, 1989, p. 15 (quoted in Samish Indian Tribe's Answer to Petitions for Rehearing and Rehearing En Banc, and Amicus Briefs, No. 03-35145, United States Court of Appeals for the Ninth Circuit, April 25, 2005, p. 6).

Contrary to petitioners' arguments, Petition for Certiorari, p. 10, the Ninth Circuit has never acknowledged or held that the Tulalip Tribes would have had a right to intervene in the Samish recognition proceeding if Samish recognition had an impact on Samish treaty status. The Ninth Circuit did not find in either *Greene I* or *II* that the Tulalip Tribes had a significantly protectable interest justifying intervention in the Samish recognition proceeding under any scenario. The only statement the Ninth Circuit did make in any way related to this issue was to note that **if** a party's protected interest will be impaired, then that party has been allowed to intervene. *Greene I*, *supra*, 996 F.2d at 977. The Court then went on to hold, however, only that any interest the Tulalip might have on the issue (without any ruling that they did have an interest) could be raised in any action the Samish brought in *United States v. Washington* if the Samish

Tribe decided to relitigate its treaty fishing rights once it successfully achieved federal recognition. *Id.* at 977-78.[13]

To recognize petitioners' due process arguments would significantly undermine federal "exclusive" or "plenary" authority over Indian affairs. *See Seminole Indian Tribe v. State of Florida*, 517 U.S. 44, 62 (1996); *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 83-84 (1977). Even more significantly, it would overturn a long-standing, critical conclusion of law in *Washington I*. Petitioners, not the Samish Indian Tribe, would throw settled law into question. *See* Petition for Certiorari, p. 3.

Federal recognition of Indian tribes is a political question committed exclusively to the Executive and Legislative Branches. It is generally not subject to judicial review.[14] The federal courts are required to defer to the political branches' determination that a group of Indians constitutes a tribe. *Samish Indian Tribe, supra*, 394 F.3d at 1158. As Judge Boldt ruled in *Washington I*:

> The recognition of a tribe as a treaty party or the political successor in interest to a treaty party is a federal political question on which state authorities and federal courts must follow the determination by the legislative or executive branch of the Federal Government.

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[13] The court also identified the Tulalips' only interest as a possible dilution of its treaty fishing allocation, *id.* at 976, and held that an economic stake in the harvest of fish, even if significant, is not a significantly protectable interest for due process purposes. *Id.*

[14] This issue is discussed at great length in the *Samish Indian Nation* decision at 419 F.3d at 1369-1373. For example: "As a political determination, tribal recognition is not justiciable." 419 F.3d at 1370 (citing *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 419 (1865)).

384 F.Supp. 312, 400 (Conclusion of Law # 9). Other Indian tribes or parties have no legal right to infringe upon this Executive Branch authority.[15] Even when the Executive Branch has "canalized" the previous discretion of its officials through federal acknowledgment regulations establishing an acknowledgment process, *Miami Nation of Indians v. Dept. of Interior*, 255 F.3d 342, 348 (7th Cir. 2001), Executive Branch recognition authority essentially remains a non-justiciable political decision. *Samish Indian Nation*, 419 F.3d at 1370-73.

In the Samish recognition proceeding, the federal government found that the Samish Tribe is the political successor in interest to the historical Samish Tribe that was a signatory to the Treaty of Point Elliott. *Samish Indian Tribe*, 394 F.3d at 1159-1161; *see Greene II*, 64 F.3d at 1270 ("the Tulalip Tribe emphasizes that in the petition for recognition, the Samish Tribe has not claimed to be any tribe other than the historical Samish Tribe that was party to the Treaty of Point Elliott. To the extent that the Samish rely upon historical roots in this litigation, the roots are probably the same as those they posited in *Washington II*"); *see Samish Tribe of Indians v. United States*, 6 Ind. Cl. Comm'n 169, 172 (1958) ("We conclude that petitioner, which alleges it is a tribal organization

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[15] This conclusion applies to a federal decision to enter into a treaty with an Indian tribe as well as Executive Branch administrative recognition of a tribe. As the Federal Circuit noted in the *Samish Indian Nation* decision, "[t]here are generally three means by which the federal government can recognize an Indian tribe." 419 F.3d at 1369-70; *see* F. Cohen, Handbook of Federal Indian Law 5-6 (1982 ed.). Two of the three methods referred to are by treaty or by executive branch action taken pursuant to authority delegated by Congress. *Id.* There is no judicial review of the treaty authority under the U.S. Constitution that is relevant to this case.

recognized by the Secretary of Interior of the United States, has shown itself to be the descendants and successors in interest of the Samish Indians of aboriginal times."). The Tulalip Tribes claimed they had a right to intervene in the Samish administrative recognition proceedings under F.R.C.P. 24, because of the alleged impact Samish recognition might have on it. *See Greene I*, *supra*, 996 F.2d at 976-78. The Federal Rules of Civil Procedure, however, do not grant substantive rights to a party. *See Chemehuevi Indian Tribe v. Cal. St. Bd. of Equal.*, 757 F.2d 1047, 1053 (9th Cir.), *rev'd on other grounds*, 474 U.S. 9 (1985) (statute authorizing Federal Rules of Civil Procedure, 28 U.S.C. § 2072, specifies that the rules "shall not abridge, enlarge or modify any substantive right").

The federal acknowledgment regulations do not grant the Tulalip Tribes or any other party the right to challenge the federal government's decision to recognize an Indian tribe. 25 C.F.R. Part 83. The regulations allow only a limited right of participation by "interested parties." *E.g.*, 25 C.F.R. § 83.1 (definition of interested party); 25 C.F.R. § 83.11 (right of interested party to request reconsideration of recognition decision). The only judicial review available under the APA to review a federal acknowledgment decision for an Indian tribe is to "ensure that the government followed its regulations and accorded due process." *Samish Indian Nation*, *supra*, 419 F.3d at 1373 (citing *Miami Nation*, *supra*, 255 F.3d at 348). In all other aspects, the federal government's decision to recognize an Indian tribe remains a political act. *Id.*

While petitioners claim that their due process rights were violated in the Samish recognition proceedings, they have never shown in what manner their rights were

actually injured or how they were denied from participating in or presenting any evidence or arguments in opposition to Samish recognition. The Tulalip and other tribes participated in the Samish recognition proceeding as interested parties. *Greene I*, 996 F.2d at 975. They participated as amicus parties in the remanded recognition hearing. *Id.*, 996 F.2d at 976, 978. The Tulalip Tribes submitted numerous briefs on every conceivable issue in those proceedings. The United States actively opposed Samish recognition and vigorously litigated the issue on behalf of other tribes; petitioners have never demonstrated how the United States' representation in that proceeding was deficient or did not represent their interests. As just one example, the United States presented several representatives of the Swinomish Indian Tribal Community, one of the petitioning tribes here, as witnesses against Samish recognition. *See* Memorandum in Support of Samish Indian Nation's FRCP 60(b)(6) Motion to Reopen Judgment, (W.D.Wash.), No. 70-9213, Sub-proceeding 01-2, CR 44, Ex. 6, p. 15, Recommended Decision on Samish Recognition, United States Dept. of Interior, Office of Hearings and Appeals, Aug. 31, 1995. Petitioners' due process arguments are theoretical; they are not grounds for granting certiorari.

Petitioners' due process arguments also carry no weight with regard to equitable allocation of the treaty fish harvest among tribes. Equitable considerations are not available to defeat or interpret the treaty rights of a tribe. *United States v. Washington*, 157 F.3d 630, 649-50 (9th Cir. 1998). In *Washington I* the District Court held that the tribes with fishing rights under the various Puget Sound treaties had a right to 50 percent of the harvestable fish passing through their traditional off-reservation

fishing grounds. *Samish Indian Tribe, supra*, 394 F.3d at 1154. No property right to any specific number or percentage of fish has been decided in *United States v. Washington*:[16]

> [T]he Indians are entitled to an equitable apportionment of the opportunity to fish in order to safeguard their federal treaty rights (citation omitted). The district court's apportionment does not purport to define property interests in the fish; fish in their natural state remain free of attached property interests until reduced to possession. *Geer [v. Connecticut]*, 161 U.S. 519, 529 (1896). Rather, the court decreed an allocation of the opportunity to obtain possession of a portion of the run.

Washington I, 520 F.2d at 687. The allocation of harvest and other details of actual exercise of Samish treaty rights are subject to equitable considerations, balancing the interests of the parties. *United States v. Washington, supra*, 157 F.3d at 652-55.

The other treaty tribes, as set forth in the *Greene* decisions, will have the right to state their positions on equitable allocation of a portion of the harvest to Samish in *United States v. Washington* once the Samish Tribe obtains treaty status. Petitioning tribes do not have and had no property interest sufficient to allow them to separately

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[16] *See Menominee Indian Tribe v. United States*, 391 U.S. 404 (1968), which stated that hunting and fishing rights can constitute a property right. Petitioners here claim a property right interest, but *Menominee* did not determine the "precise nature and extent of those hunting and fishing rights" in that case, 391 U.S. at 407, and did not rule that there was a property right in the allocation of an overall Indian treaty harvest right among all treaty tribes.

challenge Samish recognition. The opportunity to challenge Samish treaty harvest allocation is apparent from ongoing sub-proceedings in *United States v. Washington*; adjustment to treaty harvest allocations and challenges to tribal shares of treaty harvest are ongoing, without assertion by a tribe that due process property rights have been violated. *See, e.g.*, Sub-proceeding No. 91-1 (Halibut fishery, Order dated May 3, 2005, Docket 17954, Order declining to adopt interim halibut management plan); Sub-proceedings 05-1 and 05-02 (Skokomish dispute with regard to Hood Canal fishery allocation plan); Sub-proceedings 05-3 and 05-4 (challenges by petitioners Tulalip, Upper Skagit, and Swinomish to Suquamish usual and accustomed fishing grounds and stations). The Court should deny the petition for certiorari.

B. The Ninth Circuit's Decision On Rule 60(B)(6) Issues Is Consistent With Precedent And Does Not Create A Conflict With Other Circuits.

The Ninth Circuit's decision involved only subsection (6) of Rule 60(b): "On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for . . . (6) any other reason justifying relief from the operation of the judgment." Contrary to assertions of petitioners, this case does not and has never involved subsections (1) or (3) of Rule 60(b). Petitioners' attempt to strain the language of Rule 60(b) to implicate subsections (1) and (3) in this case are completely without merit.

The Ninth Circuit applied the Rule 60(b)(6) precedents of this Court and of the Ninth Circuit under Rule 60(b)(6) in *Samish Indian Tribe* to reach a fact based conclusion that extraordinary circumstances existed under

the Rule sufficient to require that the judgment against the Samish Tribe in *Washington II* be vacated: "As the Samish's recognition was a circumstance beyond the tribe's control, their subsequent recognition is an extraordinary circumstance that warrants setting aside the judgment in *Washington II*." 394 F.2d at 1161. *See id.* at 1159. The Court of Appeals relied on two of its Rule 60(b)(6) decisions for this conclusion, *United States v. Alpine Land & Reservoir Co.*, 984 F.2d 1047 (9th Cir. 1993), and *Cmty. Dental Servs. v. Tani*, 282 F.3d 1164 (9th Cir. 2002), both of which applied Rule 60(b)(6) standards established by this Court in *Klapprott v. United States*, 335 U.S. 601 (1949); *Ackermann v. United States*, 340 U.S. 193 (1950), and *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988).

The present case does not involve a change of law as petitioners assert. The Ninth Circuit followed its own precedent and the precedent of other Circuits in ruling in favor of the Samish Indian Tribe. Subsection (3) of Rule 60(b) does not apply to the specific factual extraordinary circumstances relied upon by the Ninth Circuit to grant Rule 60(b)(6) relief in this case. Petitioners do not even allege that Rule 60(b)(6) was mis-applied in this case or that the Ninth Circuit violated precedent under the Rule in its decision.[17] There is no conflict in the case law or between the Circuits under Rule 60(b)(6) and the Court should deny certiorari in the present case.

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[17] Supreme Court Rule 10 states that petitions for a writ of certiorari are disfavored when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted on behalf of the Samish Indian Tribe this 7th day of November, 2005.

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IN THE

Supreme Court of the United States

THE LUMMI NATION, *et al.*,

Petitioners,

v.

SAMISH INDIAN TRIBE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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RULE 29.6 STATEMENT

Petitioner's Rule 29.6 Statement was set forth at page *iv* of its Petition for a Writ of Certiorari, and there are no amendments to that Statement.

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INTRODUCTION

The United States agrees that the decision below conflicts with and undermines prior precedent. However, the United States ignores its corrosive effect on Fed. R. Civ. P. 60(b)(6) jurisprudence and the case load of the judiciary. The United States portrays the Ninth Circuit opinion as narrow in its implications, and concludes that the decision is unworthy of this Court's review.[1] The United States is able to reach that conclusion only by (1) ignoring all of the conflicts the Ninth Circuit has created with sister Circuits, *Petition for Certiorari* at 12-18, and (2) failing to discuss any of the other concerns raised by Petitioners in their Petition.[2] By offering no rebuttal, the United States admits that the decision below is inconsistent with Rule 60(b) cases from this Court[3] and from the sister Circuits.[4]

Samish likewise does not attempt to rebut the argument that the Ninth Circuit's decision is directly contrary to well-established law of this Court and the Circuits. Instead, Samish puts on the cloak of victimhood and asks the Court to relieve it of the consequences of its deliberate, intentional choice in 1975 to proceed with treaty rights litigation without first obtaining federal recognition. In so doing, it raises new issues and refers to "evidence" not contained in the record. Allowing Samish to re-open the 1979 decision, *United States v. Washington*, 476 F. Supp. 1101, (W.D. Wash. 1979) would violate a large body of Rule 60(b) law.

1. The Ninth Circuit Ruling Has National Significance.

The federal district courts have already noticed the Ninth Circuit decision, and relied on it to expand the grounds for relief under Rule 60(b)(6). For example, in one of the myriad

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1. The United States iterates its argument no less than four times. The United States doth protest too much. Repetition does not strengthen a weak argument.

2. These concerns include the Ninth Circuit's denial of due process, *Petition for Certiorari* at 9-12 and the Ninth Circuit's expansion of "misconduct" covered by Rule 60(b), *id.* at 19.

3. *See, e.g., Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988).

4. *See, e.g.*, cases cited at pages 12, 14, 15, & 17 of *Petition for Certiorari*.

parts of the Exxon Valdez case, the Alaska District Court cited the Ninth Circuit decision on review here, and then went on to rule that a claimant would be allowed to reopen his fishing claim because his attorney failed to inform him that the claim had been dismissed. *In re the Exxon Valdez*, __ F. Supp. 2d __, 2005 WL 2340703 at *4 (D. Alaska September 22, 2005). The court allowed a reopening on the basis that the claimant personally did not know that his fishing claims had been dismissed even though his lawyer was aware that of the dismissal. *Id.*

This ruling is inconsistent with well-settled law from other circuits holding that the client's sole remedy in such a case is legal malpractice action against his attorney. *Daniels v. Brennan*, 887 F.2d 783, 788 (7th Cir. 1989), *quoting Pryor v. United States Postal Service*, 769 F.2d 281, 288-89 (5th Cir. 1985) (allowing reopening each time a party alleged "hardships" due to a negligent attorney would cause the "meaningful finality of judgment" to "largely disappear").

Thus, the Ninth Circuit's ruling has already yielded results contrary to settled law of this Court and other circuits. It also creates the potential for reopening prior rulings in the multitude of complex, multiparty cases in which federal courts across the nation retain continuing jurisdiction. *See, e.g., Ayers v. Fordice*, 111 F.3d 1183 (5th Cir. 1997), *cert. denied*, 522 U.S. 1084 (1998) (jurisdiction over remedial decree entered in class action alleging racially dual system of public higher education); *Floyd v. Ortiz*, 300 F.3d 1223 (10th Cir. 2002) (jurisdiction to administer consent decree in action by inmates against Colorado Department of Corrections contesting DOC's handling of prison canteen funds); *Marino v. Pioneer Edsel Sales, Inc.*, 349 F.3d 746 (4th Cir. 2003) (jurisdiction over consent decree entered in class action by auto dealers); *United States v. State of Tennessee*, 143 Fed. Appx. 656 (6th Cir. 2005) (unpublished decision) (jurisdiction over Remedial Order and Community Plan entered in action alleging that State of Tennessee failed to provide humane conditions to mental retarded residents of state-operated care facility); *Jeff D. v. Kempthorne*, 365 F.3d 844 (9th Cir. 2004) (jurisdiction over consent decrees entered in class action by indigent minors

diagnosed with severe emotional and mental disabilities who were being housed in state facilities with adults including sexual predators); *McDowell v. Philadelphia Housing Authority*, 423 F.3d 233 (3rd Cir. 2005) (jurisdiction over administration and enforcement of consent decree entered in class action by public housing tenants because of housing authority's failure to properly factor gas rates into gas allowances).

2. This proceeding does *not* challenge the Department of the Interior's decision to grant federal recognition to Samish.

Samish devotes much of its Brief in Opposition to explaining that federal recognition is a "political question" and that the federal government's decision to grant federal recognition to Samish cannot be challenged in this appeal. *Brief in Opposition to Certiorari* at 14-16. This discussion is interesting, but completely irrelevant, because the Petitioning Tribes are NOT challenging Interior's decision in this proceeding.[5] The Petitioning Tribes are challenging the Ninth Circuit's decision to ignore well-established finality rules and allow Samish to resurrect its attempt to relitigate its entitlement to treaty fishing rights.

Samish attempts to characterize this case as an Indian law case with limited applications in other contexts, but it is not. This is a procedural case aimed at preserving the important role that Federal Rule of Civil Procedure 60(b) plays in furthering the essential interests served by *res judicata* and other finality doctrines. The Ninth Circuit's decision in this matter, particularly its decision finding extraordinary circumstances in *this* case based on alleged misconduct that occurred in a *different* case twenty years earlier, has implications far beyond the relatively small Indian law world.

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5. The only danger to Samish's administrative recognition is if the current Ninth Circuit decision stands. A rationale similar to that which allows Samish the opportunity to reopen its Treaty status case applies with equal force to allow Tulalip and the other interested Tribes to seek to reopen the Samish recognition proceeding.

3. Motions to reopen judgments necessarily implicate finality concerns.

Samish claims that the Ninth Circuit decision does not implicate finality concerns:

> [T]he *Samish Indian Tribe* decision does not dispense with the *res judicata* effect of the Samish judgment in *Washington II*. The Ninth Circuit in *Samish Indian Tribe* decided . . . that the Samish Tribe [should] be allowed to revisit the issue of its treaty status in *United States v. Washington*.

Samish Brief in Opposition at 10. Samish apparently does not understand that being allowed to "revisit" a previously decided issue is exactly what the doctrine of *res judicata* is designed to prevent:

> When a litigant files a lawsuit, the courts have a right to presume that he has done his legal and factual homework. It would undermine the basic policies protected by the doctrine of res judicata to permit the [plaintiffs] to once again avail themselves of judicial time and energy while another litigant, who has yet to be heard even once, waits in line behind them.

Car Carriers, Inc. v. Ford Motor Co., 789 F.2d 589, 596 (7th Cir. 1986). The purpose of *res judicata* is to ensure "that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." *Baldwin v. Iowa State Traveling Men's Association*, 283 U.S. 522 (1931).

4. Protected property interests of Tulalip and the other Petitioning Tribes have been adversely affected by the Ninth Circuit's decision threatening their treaty rights based on a proceeding in which the Petitioner Tribes were not allowed to participate.

Tribal fishing rights secured by Treaty with the United States are a "property right" protected by the Due Process Clause of the Fifth Amendment. *Menominee Indian Tribe v. United States*, 391 U.S. 404, 413 (1968). Thus, a Tribe who shares

the property right would be allowed to intervene in any action where a new group of Indians sought to dilute its share. But Samish persuaded the Ninth Circuit that their recognition would not threaten Tulalip fishing rights, *Greene v. United States*, 966 F.2d 973 (9th Cir. 1993):

> The Tulalip concede that the district court limited the Samish claims to federal recognition. Thus, adjudication of the Samish treaty fishing rights is not an issue in the pending proceeding. Nevertheless, the Tulalip argue that renewed administrative inquiry into the Samish tribal status will raise nearly identical questions. They assert that the BIA will review much of the same factual record that served as the basis for the judicial allocation of fishing rights.
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> . . .
>
> We recognize that the two inquiries are similar. Yet each determination serves a different legal purpose and has an independent legal effect. Federal recognition is not a threshold condition a tribe must establish to fish under the Treaty of Point Elliott.
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> . . .
>
> Similarly, the Samish need not assert treaty fishing rights to gain federal recognition. . . . Even if they obtain federal tribal status, the Samish would still have to confront the decisions in Washington I and II before they could claim fishing rights. ***Federal recognition does not self-execute treaty rights claims.***

Greene I, 996 F.2d at 976-77 (*emphasis added*).

Having prevailed on that argument, which prevented the Tribes from participating in the recognition proceedings to protect their interests, Samish now claims that its recognition should allow it to do exactly what the Ninth Circuit said it could not, *i.e.*, allow Samish to reopen the Treaty fishing rights decisions. Samish's position directly contradicts the Ninth Circuit's observation that